



In the Matter of:

**DEPARTMENT OF THE AIR FORCE
SAF/AQCR EASTERN REGIONAL OFFICE**

ARB Case No. 98-125

***In re* request for review and reconsideration
of Wage Determination 94-2393 (Rev. 4)
for Pope AFB and Seymour Johnson AFB,
North Carolina**

DATE: May 26, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

Clarence D. Long, III, Esq., *Department of the Air Force, Washington, D.C.*
Jesus N. Pernas-Giz, Ruth A. Paauwe, *Department of the Air Force, Patrick AFB, Florida*

For the Respondent:

Carol Arnold, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., *U.S. Department
of Labor, Washington, D.C.*

FINAL DECISION AND ORDER

This case is before the Board on the petition of the Department of the Air Force (Air Force) challenging Wage Determination (WD) 94-2393 (Rev. 4) applicable to service contracts performed at Pope Air Force Base (AFB) and Seymour Johnson Air Force Base in North Carolina. The Air Force seeks review of two final ruling letters issued April 30, 1998, by the designee of the Administrator, Wage and Hour Division (Administrator), pursuant to the Service Contract Act of 1965, as amended, 41 U.S.C. §351 *et seq.* (SCA or the Act).

The wage determination that is challenged by the Air Force covers a large 36-county area that includes 32 counties in North Carolina and four counties in South Carolina. This territory represents a consolidation of three smaller geographical areas, each of which previously had been subject to a separate SCA wage determination. The Air Force argues that the consolidated wage determination does not comply with the SCA requirement that the Wage and Hour Division predetermine wage rates that prevail in the "locality." As relief, the Air Force requests that the Board direct the Administrator to issue new wage determinations for the service contracts at Pope AFB and Seymour Johnson AFB that reflect wages prevailing within an area limited to a reasonable commuting distance around each of those installations. We have jurisdiction over the appeal pursuant to 29 C.F.R. §§4.56(b) and 8.1(b) (1999).

This case had been consolidated with three other appeals, each involving challenges to SCA wage determinations in the Puget Sound region. *See Dep't of the Army*, ARB Case Nos. 98-120, 98-121, 98-122 (Dec. 22, 1999). Oral argument in all four cases was held on November 5, 1998. On July 15, 1999, the Board issued an order severing this North and South Carolina wage determination challenge from the three Puget Sound cases.

Based on the record before us, we agree with the Administrator's conclusion that the wage determination for southeastern North Carolina^{1/} is an acceptable exercise of discretion under the facts of this case, and that the data supplied by the Air Force does not justify reconsideration of the wage determination rates. We therefore deny the Air Force's petition for review.

BACKGROUND

The Service Contract Act directs the Secretary of Labor to determine minimum wage and fringe benefit rates for service workers employed on federal service contracts. Under the Act and its implementing regulations, the Administrator (to whom the Secretary has delegated authority) issues wage determinations that are incorporated into the contract specifications for each service contract.

Two different types of wage determinations are issued. For service contracts at worksites where an existing collective bargaining agreement governs employee wages and fringe benefits, the Administrator issues wage determination rates based on the rates in the labor agreement. 41 U.S.C. §351(a)(1),(2); 29 C.F.R. §4.53. For sites where there is no collective bargaining agreement in effect, the Administrator issues a wage determination that reflects wages and fringe benefits "prevailing . . . for such [service] employees in the locality." 41 U.S.C. §351(a)(1), (2); 20 C.F.R. §4.52. The Administrator's "prevailing-rate"-type wage determinations are based on local wage data, most frequently surveys compiled by the Bureau of Labor Statistics (BLS). 29 C.F.R. §4.52(a).

This dispute involves the SCA "prevailing-rate" wage rates that are applied to federal service contracts in a large geographical area encompassing the southeastern region of North Carolina and four adjacent counties in South Carolina.^{2/} Prior to 1995, the Wage and Hour Division had issued three different wage determination schedules for this region:

- WD 94-2395 (Rev. 2)(4/7/95), applicable to contracts at Seymour Johnson AFB in Wayne County, N.C., encompassed Wayne, Johnston, Sampson and Wilson counties

^{1/} Because the two Air Force facilities involved in this case are in North Carolina, we refer to the challenged wage schedule as the "southeastern North Carolina" wage determination, even though its wage rates also apply to four South Carolina counties.

^{2/} The North Carolina counties are: Beaufort, Bladen, Brunswick, Carteret, Columbus, Craven, Cumberland, Dare, Duplin, Greene, Harnett, Hoke, Hyde, Johnston, Jones, Lee, Lenoir, Martin, Moore, New Hanover, Onslow, Pamlico, Pender, Pitt, Richmond, Robeson, Sampson, Scotland, Tyrrell, Washington, Wayne and Wilson. AR Tab G. The South Carolina counties are: Dillon, Horry, Marion and Marlboro. *Id.*

in North Carolina. Administrative Record (AR) Tab G. This wage determination was based on a BLS survey of the Goldsboro, N.C. area (Wayne County). AR Tab U.

- WD 94-2393 (Rev. 3)(8/16/95), applicable to contracts at Pope AFB in Cumberland County, N.C., encompassed Cumberland, Bladen, Harnett, Hoke, Lee, Moore, Richmond, Robeson and Scotland Counties in North Carolina, and Dillon, Marion and Marlboro Counties in South Carolina. AR Tab G. This wage determination was based on a BLS survey of the Fayetteville, N.C. area (*i.e.*, Cumberland County).
- A third wage determination, applicable to federal service contracts in other sections of southeastern North Carolina, was based on a BLS survey for the Jacksonville-New Bern area (Craven, Jones and Onslow Counties). AR Tab T.

In April 1995, the Bureau of Labor Statistics conducted a single wage and benefits survey for a 12-county area^{3/} that BLS denominated “Southeastern North Carolina.” AR Tab G. Later that year, the Wage and Hour Division issued WD 94-2393 (Rev. 4)(12/1/95), the first consolidated wage determination that would be applicable to the entire 36-county southeastern North Carolina area. This new wage determination superseded the three earlier wage determinations for the areas that previously had been addressed as separate localities. AR Tab S.

In its Petition for Review, the Air Force indicates that it first received the disputed wage determination from the Wage and Hour Division in August 1996 in response to a blanket Standard Form 98 (“Notice of Intention to Make a Service Contract”) submitted by the Air Force in July 1996. Pet. for Rev. at 2.^{4/} The Air Force represents that it challenged the wage determination informally at first; in July 1997 the Air Force filed two formal requests for review and reconsideration of WD 94-2393 (Rev. 4), pursuant to 29 C.F.R. §4.56. *Id.*; AR Tabs K, L.

The Air Force’s challenge began with its assertion that the wage rates for many of the job classifications in the southeastern North Carolina wage determination are substantially higher than the rates for the same classifications as they had appeared in the earlier, separate wage schedules. In support of its claim that the wage rates were “inflated, improperly slotted, and do not reflect the true locality rates paid in the area . . . ,” the Air Force submitted detailed analyses comparing the challenged wage determination rates with (1) wage rates from a State of North Carolina wage

^{3/} The BLS survey covered Bladen, Brunswick, Columbus, Cumberland, Craven, Duplin, Jones, Lenoir, Onslow, Pender, Sampson and Wayne Counties, all in North Carolina. AR Tab G.

^{4/} References to the parties’ pleadings are abbreviated as follows:

Air Force May 18, 1998 letter requesting Board review of Apr. 30, 1998 rulings	Pet. for Rev.
Statement of the Acting Administrator in Response to Petition for Review	Resp. Brief
Petitioners[’] Response to Statement of the Acting Administrator in Response to Petitioners[’] Request for Review	Reply Brief

survey; (2) wage rates set by the Wage and Hour Division for similar trade classifications under the Davis-Bacon Act, 40 U.S.C. §276a *et seq.*; (3) Bureau of Labor Statistics (BLS) survey wage rates; and (4) wage data collected by the Air Force as part of a survey of workers employed in the area in Information and Arts job classifications. AR Tabs K, L. The Air Force also provided a chart showing the percentage increase in wage rates for various classifications compared with the rates in the predecessor wage determinations applicable to the Pope AFB and Seymour Johnson AFB areas. *Id.*

On April 30, 1998, the Administrator's designee issued final rulings in response to each of the Air Force requests for review. AR Tabs I, J. The final rulings, which are identical in substance, were accompanied by a modified version of the challenged WD, *viz.*, WD 94-2393 (Rev. 10) (1/28/98). *Id.*; *see* AR Tab G. In essence, the Administrator rejected the Air Force's data and argument, and affirmed his earlier decision to issue a single wage decision for the entire 36-county southeastern North Carolina area (including the four South Carolina counties), explaining that the new modifications to the wage determination (Rev. 10) were based primarily on a new May 1997 BLS wage survey. AR Tabs I, J. The Administrator also explained briefly why much of the data submitted by the Air Force – including the North Carolina State survey data, Davis-Bacon Act wage rates and wage data generated by the Air Force survey – were not found to be reliable bases for adjusting the challenged wage determination. *Id.*

This appeal followed. On June 17, 1998, the Air Force submitted an addendum to its petition for review, which contained documents substantiating the sources of the various data previously relied on by the Air Force and also contained a chart calculating the percentage change between the wage rates listed in WD 94-2393 (Rev. 4) and those included in a later modified version, WD 94-2393 (Rev. 10). AR Tab H. The Administrator moved for leave to consider the Air Force's new data and issue a supplemental decision; the Board granted the motion on July 16, 1998. On July 20, 1998, the Administrator's designee issued a supplemental ruling, stating that the supplemental Air Force documentation had been reviewed and the information did not alter the Administrator's conclusion that appropriate survey data and methodology had been used to develop the challenged wage determination.^{5/}

DISCUSSION

The Administrative Review Board's consideration of the Administrator's decisions under the Service Contract Act is in the nature of an appellate proceeding. 29 C.F.R. §8.1(d). We review the Administrator's rulings to determine whether they are consistent with the statute and regulations, and are a reasonable exercise of the discretion delegated to the Administrator. *Dep't of the Army*, slip op. at 16 (citing *ITT Federal Services Corp. (II)*, ARB Case No. 95-042A (July 25, 1996) and *Service Employees Int'l Union (I)*, BSCA Case No. 92-01 (Aug. 28, 1992)).

^{5/} July 20, 1998 letter from Corlis Sellers, National Office Program Administrator, to Clarence D. Long, III, Esq., attached to July 22, 1998 letter from Carol Arnold, Esq., to M. Jo Joyce, Executive Director, ARB (Supplemental Ruling 7/20/98).

A. Positions of the parties

As previously noted, prior to 1995, separate wage determinations applicable to the southeastern portion of North Carolina (plus several South Carolina counties) were issued for the Fayetteville, Goldsboro and Jacksonville-New Bern localities. The Air Force urges that the consolidation of the three localities under a single wage determination – first WD 94-2393 (Rev. 4) in 1995, and continuing through Revision 10 in 1997 – combines “huge areas of diverse economic identities,” in conflict with basic tenets underlying the SCA. Pet. for Rev. at 4. In the Air Force’s view, the challenged wage determination fails to fulfill the statutory purpose of reflecting “a fair and justifiable measure of conditions that already exist[] in the local economy.” *Id.* The Air Force also urges that using a thirty-six county area is inconsistent with the regulatory guideline stating that “[l]ocality is ordinarily limited to a county or cluster of counties comprising a metropolitan area.” 29 C.F.R. §4.54(a). In support of its argument that SCA wage determination rates must be tied to comparative economic conditions, the Air Force cites court decisions in *Southern Packaging and Storage Co. v. United States*, 618 F.2d 1088 (4th Cir. 1980), *aff’g* 458 F.Supp. 726 (D. S.C. 1978), and *Descomp v. Sampson*, 377 F.Supp. 254 (D. Del. 1974). Pet. for Rev. at 6; Reply Brief at 8-9. The Air Force also contends that because of the “perpetually changing methodologies” used by the Wage and Hour Division, “DOL’s administration of the SCA WD process has become so arbitrary and inconsistent as to be without any credible foundation.” Reply Brief at 15.

In its submissions to the Administrator, the Air Force generated extensive tabulations in an effort to demonstrate that the wage rates in the consolidated wage determination are significantly higher when compared with the three earlier wage determinations, which were based on the smaller geographical areas. In addition to this “then vs. now” historical comparison of SCA wage determinations in North Carolina, the Air Force compared the wage rates in WD 94-9323 Rev. 4 (12/1/95) to county-by-county wage data compiled in 1995 by the North Carolina Employment Security Commission. Particularly, the Air Force focused on the wage rates in the North Carolina State-produced survey for the counties within commuting distance from Seymour Johnson and Pope Air Force Bases, comparing these rates with the figures in the Wage and Hour Division’s December 1995 wage determination. AR Tab G. In addition, the Air Force tabulations included data showing that local prevailing wage rates for building trades crafts under the Davis-Bacon Act were lower than the SCA rates, and also included a comparison with a local wage survey compiled by the Air Force itself on job classifications in the Information and Arts field. AR Tabs G, H, K, L.

Neither the final decision letters of April 30, 1998, nor the Administrator’s supplemental ruling of July 20, 1998, speaks to the Air Force’s arguments whether the 36-county “locality” in North and South Carolina was appropriate (geographically or economically) under the Service Contract Act and its regulations. AR Tabs I, J; Supplemental Ruling 7/20/98. Instead, the Administrator addressed only the statistical evidence that the Air Force submitted with its request for review and reconsideration. *Id.* The North Carolina state wage survey data was rejected by the Administrator because it was not accompanied by the criteria used for calculating the data, and because the Division “could not determine the statistical reliability of the chart, the scope of the universe surveyed, or the job descriptions of the employee classifications surveyed.” AR Tabs I, J. Comparison with the local Davis-Bacon wage determination rates was rejected because the Davis-Bacon rates are for construction workers only, and are not cross-industry. *Id.* The Air Force’s data

on local wage rates in the Information and Arts field also was not considered in the Administrator’s decision letters. *Id.*^{6/}

On appeal, the Air Force again challenges the appropriateness of the 36-county “locality,” and questions the Administrator’s rationale in rejecting the wage data it submitted. With regard to the data from the survey conducted by the State of North Carolina, the Air Force notes that the State survey is conducted in cooperation with BLS according to BLS standards; is funded by BLS; and is published by BLS in its Occupational Employment and Wage Statistics survey. Pet. for Rev. at 5. These factors, urge the Air Force, refute the Administrator’s conclusion that the State survey data are unreliable. *Id.* Furthermore, the Air Force argues that the Administrator’s rejection of the State survey data raises the question whether any data submitted in support of a wage determination challenge would be given serious consideration by the Wage and Hour Division. *Id.* at 5-6. Finally, the Air Force urges that the Administrator’s rejection of the Air Force’s data violates the regulatory mandate that the Wage and Hour Division consider “all available pertinent information as to wage rates and fringe benefits being paid at the time the determination is made.” 29 C.F.R. §4.51(a); Pet. for Rev. at 5.

B. Analysis

The Air Force raises two primary issues in this proceeding: first, whether the 36-county area of southeastern North Carolina (and adjacent South Carolina) is an appropriate “locality” under the Service Contract Act, and second, whether the Administrator erred in rejecting the Air Force’s data submissions in this case. We address each of these issues in turn.

1. The appropriateness of the “locality”

The Administrator has wide-ranging authority under the Service Contract Act to determine prevailing wage determinations. In our decision in the three Puget Sound cases that previously were consolidated with this case, we observed that

[t]he Administrator’s discretion under the Service Contract Act is perhaps at its broadest when the Administrator is issuing prevailing wage schedules. The statute requires, in relevant part, that all Federal service contracts include “[a] provision specifying the minimum monetary wages to be paid various classes of service employees . . . as determined by the Secretary [of Labor] . . . in accordance with

^{6/} With regard to the Administrator’s failure to address significant elements of the Air Force’s request for review and reconsideration, we note generally that it is important for the Administrator to consider and respond to the major substantive arguments and evidence submitted by parties who are seeking administrative action, for two reasons. First, it is important that federal officers be responsive to their constituents – whether they be workers, companies, government agencies or the public at large – simply as a matter of good governance. *See Dep’t of the Army*, slip op. at 10 n.8. Second, and more important, the Administrator must address thoroughly the points raised by the parties so that the Board can evaluate the soundness of the Administrator’s decisions and policies, based directly on the text of the Administrator’s final decisions, rather than relying upon post-hoc explanations offered by the Administrator’s counsel.

prevailing rates for such employees in the locality[.]” 41 U.S.C. §351(a)(1). Like its sister statute, the Davis-Bacon Act, nowhere does the SCA prescribe a specific methodology to be used by the Secretary or her designee, the Administrator, when determining the prevailing wage. Perhaps the clearest indicator of the very great deference owed to the Secretary and the Administrator when determining prevailing wage rates is the clear body of case law holding that the substantive correctness of wage determinations is not subject to judicial review. *United States v. Binghamton Construction Co.*, 347 U.S. 171, 177 (1954) (under the Davis-Bacon Act); *Commonwealth of Virginia v. Marshall*, 599 F.2d 588, 592 (4th Cir. 1979) (under the Davis-Bacon Act); *AFGE v. Donovan*, 25 Wage & Hour Cas. (BNA) 500, 1982 WL 2167 at *2 (D. D.C. 1982), *aff’d* 694 F.2d 280 (D.C. Cir. 1982) (table) (under the Service Contract Act). Judicial review “is limited to due process claims and claims of noncompliance with statutory directives or applicable regulations.” *Commonwealth of Virginia* at 592 (citing *Califano v. Sanders*, 430 U.S. 99, 109 (1977)).

Dep’t of the Army, slip op. at 25.

The Service Contract Act requires that the “prevailing rate”-type wage determinations reflect wages paid in the “locality.” The term “locality” is not defined within the Service Contract Act. The SCA regulations include the following interpretive language outlining the various factors that may be considered by the Administrator when determining the correct “locality” for wage determination purposes:

Under section 2(a) of the Act, the Secretary or his authorized representative is given the authority to determine the minimum monetary wages and fringe benefits prevailing for various classes of service employees “in the locality”. Although the term *locality* has reference to a geographic area, it has an elastic and variable meaning and contemplates consideration of the existing wage structures which are pertinent to the employment of particular classes of service employees on the varied kinds of service contracts. Because wage structures are extremely varied, there can be no precise single formula which would define the geographic limits of a “locality” that would be relevant or appropriate for the determination of prevailing wage rates and prevailing fringe benefits in all situations under the Act. *The locality within which a wage or fringe benefit determination is applicable is, therefore, defined in each such determination upon the basis of all the facts and circumstances pertaining to that determination.* Locality is ordinarily limited geographically to a particular county or cluster of counties comprising a metropolitan area. For example, a survey by

the Bureau of Labor Statistics of the Baltimore, Maryland Standard Metropolitan Statistical Area includes the counties of Baltimore, Harford, Howard, Anne Arundel, and the City of Baltimore. A wage determination based on such information would define locality as the same geographic area included within the scope of the survey. Locality may also be defined as, for example, a city, a State, or, under rare circumstances, a region, depending on the actual place or places of contract performance, the geographical scope of the data on which the determination was based, the nature of the services being contracted for, and the procurement method used. In addition, in *Southern Packaging & Storage Co. v. United States*, 618 F.2d 1088 (4th Cir. 1980), the court held that a nationwide wage determination normally is not permissible under the Act, but postulated that “there may be the rare and unforeseen service contract which might be performed at locations throughout the country and which would generate truly nationwide competition”.

29 C.F.R. §4.54(a) (emphasis added). Consistent with the case law cited above, this regulation similarly indicates that the Administrator has extraordinarily broad discretion when determining the “locality” to be used when issuing wage determinations, with great flexibility to establish different localities depending on a variety of factors.

The Administrator’s regulation indicates that the most commonly chosen localities are metropolitan areas. Metropolitan Statistical Areas (MSAs) are determined under standards developed by the Office of Management and Budget (OMB). 55 Fed. Reg. 12154 (1990) (OMB standards for determining metropolitan areas). In the *Dep’t of the Army* case, the Board denied challenges to a series of wage determinations in the Puget Sound area that were based on BLS survey data collected from six counties in the Seattle Consolidated Metropolitan Statistical Area (Seattle CMSA), rather than data collected from several smaller subregional areas that had been surveyed in the past as individual urban areas. Based on the underlying OMB standards for designating metropolitan areas^{7/} and supporting data from the Census Bureau on commuting patterns, we concluded that there was sufficient evidence to demonstrate that the Seattle CMSA was an economically integrated metropolitan region, and that the CMSA therefore was an acceptable “locality” under the statute and regulations. *Dep’t of the Army*, slip op. at 17-29, 36.

The wage determination challenge in this case represents a distinctly different issue. The region that is included within the Wage and Hour Division’s southeastern North Carolina wage determination encompasses three small urbanized areas that are classified as MSAs under OMB standards: Jacksonville, Goldsboro and Fayetteville. *See, e.g.*, OMB Bulletin 99-04, “Revised Statistical Definitions of Metropolitan Areas (MAs) and Guidance on Uses of MA Definitions,” June 30, 1999, List I pp. 15, 17, 22 (list of metropolitan statistical areas in the United States).

^{7/} For an extended discussion of the OMB standards for defining metropolitan areas, *see Dep’t of the Army*, slip op. at 4-6.

These three urbanized areas respectively formed the cores of the areas covered by the separate wage determinations that had been issued by the Administrator prior to December 1995 for service contracts within this region. *See* AR Tabs T, U. Under the locality regulation at 29 C.F.R. §4.54(a), these three urban areas presumptively could be deemed appropriate individual localities for SCA purposes, as advocated by the Air Force.

Unlike the Puget Sound region, there is no evidence to suggest that the 36-county southeastern North Carolina area is a metropolitan area, and the Administrator does not make any such claim in his presentation to the Board.^{8/} Instead, the Administrator observes that the pre-1995 BLS surveys of the three small urbanized areas in North Carolina did not generate enough “publishable occupations” to meet the needs of the Wage and Hour Division when developing wage determinations. *Resp. Brief* at 26. As a result, the Division had requested that BLS combine the three smaller survey areas into the larger 12-county North Carolina survey.^{9/} *Id.* Thus, the Administrator’s rationale for abandoning the three MSA-based surveys and shifting to the 12-county survey area (and the associated publication of the 36-county wage determination) focuses on an administrative issue – the need to base SCA wage determinations on sufficient reliable data – rather than an independent decision that the 36-county area reflects conventional notions of a local jurisdiction.

As was noted at oral argument before the Board, the Administrator routinely has issued wage determinations covering large geographic areas in situations in which it is impractical to develop sufficient wage survey data based on smaller localities. Perhaps at its most dramatic, the Division for many years has issued state-wide wage determinations for the “locality” of Alaska – an area of more than 586,000 square miles, spanning more than 2,400 miles between its most eastern and western points. *See Big Boy Facilities, Inc.*, Case No. 88-CBV-7, Fin. Dec. and Ord., Dep. Sec. (Jan. 3, 1989) (comparing collectively-bargained rates for food service workers at Ft. Richardson, Alaska, with mess attendant rates published in a “blanket” Alaska statewide SCA wage determination). Significantly, the Administrator has used this approach for many years with no objection from the Petitioner or from the other branches of the Armed Forces, a point that was conceded during oral argument. Thus, the basic concept underlying the Administrator’s shift to a southeastern North Carolina regional locality is neither new nor unfamiliar.

It has been the view of both this Board and the predecessor Board of Service Contract Appeals (BSCA) that the Administrator has wide discretion to adopt practical, pragmatic approaches

^{8/} Oddly, the Administrator’s final decision letters defend the southeastern North Carolina wage determination by declaring that “The BLS survey . . . is statistically designed to represent firms in a metropolitan area, exclusive of the Government sector and those firms engaged in the construction industry.” AR Tabs I, J. Although the *prior* BLS surveys were centered on the three individual metropolitan areas in this North Carolina region, there is no evidence suggesting that the 1997 12-county BLS survey reflects a single metropolitan area. The Administrator did not argue to the Board that the BLS survey area encompasses a single metropolitan area; we infer that this position has been abandoned.

^{9/} The BLS survey underlying the wage determination in this case is conducted pursuant to a contract with the Division. *Resp. Brief* at 26; *see* AR Tabs T, U, V.

that promote the efficient administration of the Act, so long as these choices were not inconsistent with the statute and were sufficiently justified. For example, in the *D.B. Clark III* case, ARB Case No. 98-106 (Sept. 8, 1998), we affirmed the Administrator’s policy of establishing a 15% cap on year-to-year wage increases, based on the specific facts presented. We noted that the policy was memorialized in neither the SCA regulations nor the Wage and Hour Division’s internal operating procedures, but nonetheless approved the capping methodology because we found that the approach was reasonable and within the Administrator’s broad discretion to devise “program guidelines that are administrable and produce consistent results.” *Clark*, slip op. at 8; *accord Dep’t of the Army*, slip op. at 24-26.

In *McDonald’s Corp.*, BSCA Case No. 92-02 (Sept. 30, 1992), the BSCA upheld the Administrator’s decision to apply a standard 24.4% shift differential to determine a wage rate for a Food Service Worker Shift Leader at various Navy facilities, resulting in a Shift Leader rate that was 24.4% higher than the Food Service Worker. This “national average shift differential” was a constant differential that had been developed by the Division. Among its theories, McDonald’s argued that the differential was improper because it was not based on survey data. The BSCA affirmed, concluding that “the Acting Administrator did not err by using the national average differential when there was no survey data which could be applied to the Shift Leader classification, since the Acting Administrator has great latitude as to the information it [sic] may consider to determine prevailing wages.” *Id.*, slip op. at 8.

In *Service Employees Int’l Union, AFL-CIO, CLC (“SEIUI”)*, BSCA Case No. 92-01 (Aug. 28, 1992), the BSCA endorsed the Administrator’s policy of using a nationwide locality for determining fringe benefit rates, based – as in this case – upon the unavailability of reliable data from smaller geographic areas:

The Department’s chief justifications for the 27-year old policy of issuing nationwide fringe benefit determinations are the absence of other, reliable area fringe benefit information and that the “locality” concept “has an elastic and variable meaning. . . .” 29 C.F.R. 4.53.^[10] A nationwide rate is certainly the most elastic interpretation conceivable; however, *this interpretation is within the Acting Administrator’s discretion, especially where as here, there is no alternative, reliable locality-based fringe benefit data.*

Id., slip op. at 10 (emphasis added)

In this case, the Air Force criticizes the Administrator’s decision to merge the three survey areas that had been used previously, arguing that the Administrator made a poor choice when

^{10/} The locality regulation was redesignated as 29 C.F.R. §4.54 in 1996. 61 Fed. Reg. 68664 (Dec. 30, 1996).

deciding to join the data from the three urbanized areas, rather than altering the data collection methodology or sources:^{11/}

DOL has simply replaced three MSA surveys with a single consolidated survey of twelve counties, extrapolating this data to the 36-county area. DOL claims the original surveys did not yield sufficient data. Had DOL attempted to improve the original survey methods to increase the yield, without increasing geographic area, the surveys would have resulted in data more beneficial to Wage and Hour for the purposes of SCA.

Reply Brief at 6.

As a general proposition, we agree that the Air Force argument in support of the smaller localities in North Carolina has merit, and would track more precisely the preferred “metropolitan area” model for locality that is specified in the SCA regulations. *See* 29 C.F.R. §4.54(a). But as we observed in the companion Puget Sound wage determination cases,

The Board will upset a decision of the Administrator only when the Administrator fails to articulate a reasonable basis for the decision, taking into account the applicable law and the facts of the case. Thus, the central question on appeal . . . is not whether a different methodology from the one chosen by the Administrator might have been *more* reasonable, but simply whether the Administrator’s chosen methodology is consistent with the law and the facts before us

* * *

Fundamental concepts of “locality” and “prevailing” are critical threshold issues in wage determination matters, but they are followed by a host of equally challenging problems such as competing methodologies for collecting and analyzing wage data. In many of these situations requiring interpretation of the statute or its regulations, there is no single “right” or “obvious” answer to these questions. Instead, the Administrator must choose from a variety of options while trying to reconcile several interests: the statutory mandate that local labor standards be protected; the need to establish predictable and enforceable policies; the goal of promoting stability in the Federal procurement system; and the obligation to be an effective steward of the resources provided by Congress for implementing the statute, using them as efficiently as possible.

^{11/} The alternative data sources supplied by the Air Force are discussed in the next section.

Dep't of the Army, slip op. at 32, 35 (citations and internal quotations omitted; emphasis supplied).

As discussed above, it has been a longstanding practice of the Administrator to expand the geographic scope of a wage determination area when sufficient reliable data is not available covering a smaller jurisdiction. We agree with the Air Force that the 36-county southeastern North Carolina area does not manifest the kind of economic integration that typifies an urban area; however, although the wage determination applies to a large territory, we see nothing in the record in this case to suggest that the BLS wage data from the core 12-county area (AR Tab V) does not reasonably reflect the general wage patterns in the overall 36-county jurisdiction. The area covered by the wage determination is substantially rural, with three small urbanized centers and no major high-wage cities or industrial areas that might otherwise skew the general survey results. The availability of data from a larger survey universe ordinarily should enhance the reliability of the wage determination process.

Based on the record before us, we are not persuaded that the southeastern North Carolina area is an impermissible “locality” for SCA purposes, and therefore affirm the Administrator’s decision on this issue.

2. *The Administrator’s rejection of the Air Force’s data submissions*

This case is an appeal from a denied request for review and reconsideration of the wage determination. In addition to challenging the Administrator’s choice of “locality,” the Air Force also argues that the Administrator erred by rejecting the data that the Air Force submitted challenging the accuracy of the wage rates in Wage Determination 94-2393.

As previously discussed, the primary data sources relied upon by the Air Force were county-by-county wage surveys for selected occupations conducted by the Employment Security Commission of North Carolina in 1996 and 1997. AR Tabs G, K, L. These surveys were conducted by the state agency under the Occupational Employment Statistics (OES) survey program pursuant to cooperative agreements with the federal Bureau of Labor Statistics. AR Tab G. In its petition to the Board, the Air Force points to the involvement of the BLS as evidence of the data’s reliability. Pet. for Rev. at 5.

In addition to the North Carolina OES survey data, the Air Force presented wage data from an informal in-house survey of employers that employed workers in “Information and Arts” job classifications, as well as DOL’s Davis-Bacon wage rates. AR Tabs K, L.

In the April 1998 final decision letters, the Administrator rejected this information, declaring that the Air Force

did not provide the criteria used for calculation of the [OES and Information and Arts] data. We could not determine the statistical reliability of the [Air Force’s] chart, the scope of the universe surveyed, or the job descriptions for the employee classifications surveyed and, therefore, we could not use it Unlike SCA wage

rates, Davis-Bacon rates are based on construction workers' data from specific construction projects and not cross-industry surveys.

AR Tabs I, J.

Subsequently, the Air Force supplied additional information concerning the methodology underlying the OES surveys. AR Tab G. However, in a July 1998 supplemental ruling the Administrator's designee reaffirmed the earlier decisions and denied the Air Force's request for review and reconsideration of the wage determinations. *See* Supplemental Ruling 7/20/98.

In his brief to the Board, the Administrator rejects the Air Force's in-house survey of Information and Arts classifications by stating that it "clearly is not a statistically valid survey" because it lists only job titles and hourly rates, without a description of job duties or an explanation how the positions surveyed by the Air Force correlate to the classifications in the challenged wage determination. Resp. Brief at 27. The Administrator also notes that even though the North Carolina OES survey is conducted in cooperation with the BLS, the OES data cannot be compared with the BLS Occupational Compensation Survey (OCS) normally used for setting SCA wage rates because (1) the North Carolina OES survey relies on employers to classify their employees, while under the OCS program the BLS sends field economists to the workplace to perform classifications; (2) the OES program focuses on occupations by industry, while the BLS OCS program is a true cross-industry survey; and (3) the jobs that are listed in the state's OES survey do not show distinctions between different levels of function within an occupation (*e.g.*, Secretary I, Secretary II, etc.), while the BLS OCS program provides this kind of differentiation. *Id.* at 27-28.

Under the facts before us, we conclude that the Administrator has made the better argument in this case. We agree with the Administrator that the North Carolina OES data generally is inferior compared with the BLS Occupational Compensation Survey. In other cases, this Board and its predecessors similarly have considered data compiled by state and local agencies that were deemed methodologically inferior to the BLS survey, and likewise have affirmed the Administrator's denial of reconsideration based on such evidence. *See, e.g., Dep't of the Army*, slip op. at 31-33; *Tri-States Services Co.*, Case No. 85-SCA-12, Dep. Sec. Fin. Dec. and Ord. (Sept. 28, 1990). We also concur with the Administrator's conclusion that the Air Force's informal Information and Arts survey lacks critical information needed to prevail over the BLS data.

CONCLUSION

For the reasons discussed above, we find that the geographical area covered by the Administrator's southeastern North Carolina wage determination is an acceptable locality for purposes of the Service Contract Act. In addition, we find that the Administrator's decision denying

reconsideration of the wage determination based on the Air Force's data submissions was reasonable. Accordingly, the Administrator's April 30, 1998 final decision and July 20, 1998 supplemental ruling are affirmed, and the Petition is **DENIED**.^{12/}

SO ORDERED.^{13/}

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

^{12/} On April 13, 2000, the Administrator submitted a motion requesting that the Board expedite consideration of this case. Because we now issue the requested disposition, the motion is moot.

^{13/} Board Member E. Cooper Brown did not participate in the consideration of this case.